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Supreme Court of the United States

OCTOBER TERM, 1993

CYNTHIA KELLEY, INDIVIDUALLY
AND ON BEHALF OF HER MINOR CHILDREN
JERRED SETH KELLEY AND
CINDY LYNN KELLEY

PETITIONERS

versus

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

Cynthia Ann KELLEY, Individually and on Behalf of Her Minor Children Jerred Seth Kelley and Cindy Lynn Kelley,

Plaintiff-Appellant
Cross-Appellee,

v.

PRICE-MACEMON, INC.,et al.,

Defendants,

Industrial Refrigerated Systems, Inc.,

Defendant-Appellee
Cross-Appellant.

No. 92-3511

United States Court of Appeals,
Fifth Circuit.

June 15, 1993.

Widow of ice plant employee killed by auger in ice bin brought products liability action against seller of bin. The United States District Court, Eastern District of Louisiana, George Arceneaux, Jr., J., after ordering new trial on issue of seller's liability, granted summary judgment in favor of seller. Widow appealed, The Court of Appeals, King, Circuit Judge, held that: (1) genuine issue of material fact as to whether seller of auger-equipped ice bin had knowledge of danger presented by bin precluded summary judgment for seller, but (2) auger-equipped ice bin

presented danger so obvious that seller had no duty to warn.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before KING and EMILIO M. GARZA, Circuit Judges, and COBB*, District Judge.

KING, Circuit Judge:

After the tragic death of her husband in an ice-plant accident, Cynthia A. Kelley brought this products liability action against Industrial Refrigerated Systems, Inc., and other parties involved in the manufacture, installation, and sale of the ice plant. All named defendants except Industrial ultimately were dismissed from the action, and the case was tried to a jury, which returned a verdict in favor of Industrial. On Kelley's motion, however, the district court ordered a new trial on the sole issue of Industrial's liability as the seller of the plant. Industrial subsequently filed a motion seeking summary judgment on this same issue, which the district court granted.

Kelly now appeals, arguing that the district court erred in granting summary judgment. On cross-appeal, Industrial contends that the district court should never have ordered the new trial. After a careful review of the record, we conclude that the district court properly granted Industrial's motion for summary judgment. We therefore

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*District Judge of the Eastern District of Texas, sitting by designation.

affirm the judgment of the district court, and we need not reach the question of whether the district court erred in granting the new trial.

I.

In January 1987, Industrial Refrigerated Systems, Inc., ("Industrial") contracted with Delton Demere to provide the equipment for an ice plant, which was to be assembled in Leeville, Louisiana, along Bayou Lafourche. The plant was designed to provide a fully automated, or "pushbutton," system for delivering ice for sale to local fishermen, shrimpers, and seafood companies. Its primary components were: (1) a commercial ice-making machine; (2) a large refrigerated storage bin or silo, in which bulk ice would be stored; and (3) an automated delivery system, which would move the ice out of the storage bin.

The delivery system consisted of a "sweep" auger—large rotating screws which pivoted around a gearbox in the center of the storage bin's steel floor, sweeping the floor and pulling the ice into a chute—and a conveyor belt, which then transported the ice out to the point of sale. On the side of the storage bin were four small service doors, which provided access to the inside of the bin. The system's control panel was located outside of the bin, near one of the service doors.

Pursuant to the contract, Industrial arranged for the delivery of the plant's component parts to the job site, while Demere built the foundation and made arrangements for the installation of the components. Price-Macemon, Inc., the manufacturer of the storage bin and auger, provid-

ed a factory representative to supervise the installation. By late May, the ice plant was fully installed and ready for operation. Prior to commencing commercial operations, however, Damas Demere, Delton's brother and the general manager of the ice plant, held a start-up meeting, at which time he, David Easley, the installation contractor, and representatives of Industrial conducted a walk-through of the plant. During this walk-through, the participants entered the ice storage bin to "work out" some problems with the auger and, while inside, saw the auger "mutilate" a metal shovel.[1] The participants later offered differing versions of the incident: Demere stated that Easley was holding the shovel, and the auger "pulled it out of his hand"; Easley stated that he "threw it in there" as a "demonstration."

From its first day of operation, the ice plant had problems. Apparently because the storage bin was inadequately insulated, a layer of ice at the top of the bin often would freeze or "clump" up while the ice-maker was not actually in production. When this clump of ice reached the bottom of the bin, the auger would not grab the ice and move it to the chute. Instead, the ice would "bridge," or stay on top of the auger, which then would push the ice around the floor of the bin. The result was a complete interruption in the delivery of the ice. Efforts to change the consistency of the ice produced by the ice-maker failed to remedy the problem. Consequently, it occasionally became necessary

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[1] Screw augers are most commonly used to move grain. Apparently to facilitate the movement of ice, as opposed to grain, the leading edge of the auger, which is generally straight and smooth, had been modified by the addition of teeth to chop or grab the ice as it rotated.

for an ice-plant employee to climb into the storage bin to break up the ice clump with a pick or a shovel. In order to clear the ice from the bin as quickly as possible, plant employees developed the unfortunate practice of climbing into the bin while the auger was running, chopping the ice, and feeding it into the auger.

On the morning of July 5, 1987, Steve Fillimich, an ice-plant employee, turned on the delivery system, climbed into the storage bin, and began breaking up the approximately eighteen inches of ice that lay on the floor of the storage bin. When a second employee, Jack Kelley, arrived for work, he took over the ice-chopping duties inside the bin while Fillimich went outside to feed the ice into a truck. After several minutes, Fillimich noticed that the ice had stopped coming out of the bin. When Fillimich investigated, he discovered that Jack Kelley, who somehow had become entangled in the auger, was dead.

In July 1988, Cynthia Kelley filed this diversity action on behalf of herself and her two minor children, seeking damages arising from her husband's death. In her complaint, Kelly named as defendants eleven parties, including Industrial, allegedly involved in the manufacture, installation, and sale of the ice plant.[2] Prior to trial, however,

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[2] In addition to Industrial, Kelley's complaint named as defendants: Price-Macemon, Inc. the manufacturer of the storage bin and auger; Rochester Silo, Price-Macemon's sucessor in interest; Turbo Refrigeration Company, Inc., the manufacturer of the ice-making machine; Delton's One-Stop, Inc. and Demere Seafood, Inc., Jack Kelley's employers; Demere's Ice Company, Inc., the owner of the ice plant; Boyd Refrigeration, the installer of the ice plant; Bollinger Machine Shop & Shipyard, Inc., the entity that cut the steel floor for the storage bin; and Moore Refrigeration, an entity which apparently had no connection whatsover to the case.

Kelley's claims against all defendants except Industial were dismissed.[3]

Kelley's claims against Industrial were tried before a jury in early October 1991. Kelley pursued two theories of liability. She argued primarily that Industrial, as the "manufacturer" of the ice plant, was strictly liable for her husband's death. Alternatively, she argued that, even if Industrial were found not to be the manufacturer of the plant, it nonetheless would be liable as the *seller* of the plant for its failure to warn of a dangerous condition. The jury returned a verdict in favor of Industrial, and the district court entered a judgment in accordance with the jury's verdict on October 11, 1991.

Kelly timely moved for a judgment notwithstanding the verdict or, alternatively, for a new trial. Concluding that "reasonable and fair-minded" jurors could have reached the same verdict, the district court denied Kelley's request for judgment notwithstanding the verdict. The court nevertheless granted Kelley's motion for a new trial on the sole issue of Industrial's liability as the *seller* of the ice

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[3] Kelley's claims against the other defendants were dismissed for a variety of reasons. Price-Macemon, for example, was voluntarily dismissed as a party because it had ceased to exist, and Rochester Silo, Price-Macemon's successor in interest, had already been named as a defendant. The district court later severed Kelley's claims against Rochester Silo when it filed for bankruptcy. Kelley's attorney apparently never sought to lift the automatic stay imposed by the bankruptcy filing or otherwise pursue his client's claims against the manufacturer in the bankruptcy proceedings. Interestingly, the record reflects that Rochester Silo agreed to reimburse *Demere* for the purchase price of the bin and auger system because it was "real hard to sell ice [from the machine] after the accident."

plant.[4]

Thereafter, on April 10, 1992, Industrial filed a motion for summary judgment. In its motion, Industrial asserted that it was entitled to judgment as a matter of law because the summary judgment evidence demonstrated that it did not have knowledge of any defects or dangerous conditions in the ice plant and, alternatively, that it had no duty to warn of the auger's obvious danger. The motion was set for hearing on April 29. Thus, under Uniform Louisiana Local Rule 2.07E, Kelley was required to file her response to the motion for summary judgment on April 21, or eight calendar days prior to the hearing date.

Industrial's motion for summary judgment arrived at the office of Kelley's attorney, Henry L. Klein, on Monday, April 13. Mr. Klein, however, was out of town during the entire week of April 13 on a "combination vacation/brief-writing" trip. He allegedly did not discover the motion until late Tuesday, April 21. At that time, Mr. Klein contacted opposing counsel to request an extension of time in which to file his response, and he was informed that Industrial would not oppose an extension. Significantly, Mr. Klein failed to contact the district court on April 21 to request an extension.

The district court, having received no response from

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[4] Industrial unsucessfully sought appellate review of the district court's order granting Kelley's motion for a new trial. It first requested the district court to certify the order for permissive appeal under 28 U.S.C. §1292(b), but the district court refused to do so. It then sought review of the district court's new trial order by a petition for mandamus with this court. The petition for mandamus, however, was denied.

Kelley on April 21, reviewed Industrial's motion for summary judgment without the benefit of opposition. It found the motion to have merit and therefore granted summary judgment in favor of Industrial. A judgment to that effect was entered by the district court on April 22. Thus, when Mr. Klein finally contacted the district court on April 24, he discovered that his client's action against Industrial had been dismissed.

Four days later, on April 28, Mr. Klein filed a motion for reconsideration and a short memorandum in opposition to Industrial's motion for summary judgment. In the motion for reconsideration, Klein argued that Kelley was entitled to relief from judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure on the grounds of inadvertence or excusable neglect.[5] The district court disagreed, but, "in an abundance of caution," reconsidered Industrial's motion for summary judgment "on the merits with the benefit of plaintiff's opposition." After considering Industrial's motion in light of Kelley's response, the district court concluded that, although a fact issue did exist with respect to Industrial's knowledge of the auger's dangerousness, Industrial nevertheless was entitled to summary judgment because the auger in which Kelley had become entangled presented an obvious danger against which Industrial had no duty to warn. Accordingly, the district court refused to grant Kelly relief from the April 22 judgment.

Both parties filed timely notices of appeal. Kelley ap-

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[5] Mr. Klein explained that he "was veritably immersed" in meeting a briefing deadline in another matter, "which resulted in the inadvertent failure to notice that certain motions had been filed" in Kelley's case. Moreover, according to Klein, he would have filed an unopposed motion for extension of time with the district court on April 23 but for the murder of a close friend and neighbor on April 22.

peals from the district court's grant of summary judgment in favor of Industrial and from the district court's order refusing to grant relief from that judgment.[6] Industrial cross-appeals from the district court's November 13, 1991, order granting a new trial.

II.

Kelley argues on appeal that the district court erred in granting Industrial's motion for summary judgment and in refusing to grant her motion for relief from that judgment. Specifically, Kelly asserts, at least in her brief to this court, that the district court improperly granted Industrial's motion as "unopposed" because of her attorney's failure to file a timely response. Yet, as we have noted, *supra*, the record clearly discloses that the district court ultimately did address the merits of Industrial's motion and, in so doing, considered the "hastily-drafted" response offered by Kelley's attorney. Indeed, Kelley conceded this point at oral argument. Consequently, we need not address Kelley's specific argument that Industrial's motion was improperly granted as "unopposed." Moreover, because Kelley's concession also forecloses her argument that the district court erred in refusing to grant her motion for relief from judgment, Kelley's appeal presents only one question:

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[6] Because Kelley's "Motion for Reconsideration" may properly be considered either a Rule 59(e) motion to alter or amend judgment or a Rule 60(b) motion for relief from judgment, Kelley's appeal from the denial of that motion may also be considered as a timely appeal from the underlying order granting Industrial's "unopposed" motion for summary judgment. *See Cobb v. Miller*, 818 F.2d 1227 (5th Cir.1987) (motion to alter or amend judgment under Rule 59(e) makes judgment nonfinal for purposes of appeal); Fed.R.App.P. 4(a) (timely motion under Rule 59(e) tolls the running of time for filing a notice of appeal).

whether the district court properly granted summary judgment in favor of Industrial on the issue of its liability as the seller of the Demere ice plant.[7] Because we answer that question in the affirmative, we need not address Industrial's argument on cross-appeal that the district court erred ingranting the new trial.

A.

In our review of the district court's grant of summary judgment, we examine the record *de novo. Walker v. Sears, Roebuck & Co.,* 853 F.2d 355, 358 (5th Cir.1988). Summary judgment is proper only if the record discloses that there is no genuine issue as to any material fact and that Industrial is entitled to judgment as a matter of law. FED. R.CIV.P. 56(c). In examining the record, we must view the evidence and all justifiable inferences drawn from that evidence in the light most favorable to Kelley. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2501, 2513-14, 91 L.Ed.2d 202 (1986); *Reid v. State Farm*

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[7] Kelley also raises a number of issues regarding the manner in which the trial court should proceed in the event of a remand. Specifically, Kelley argues that we should instruct the trial court to exclude all evidence of victim fault and third-party liability. Kelley also contends that, on remand, she should be entitled to judgment as a matter of law on the issues of "strict seller liability" and "inadequacy of warning." As Kelley acknowledges in her brief, however, these issues are not "directly" presented by her appeal of the district court's grant of summary judgment or its denial of her motion to reconsider. Kelley has not appealed from the district court's denial of her motion for a judgment n.o.v., and that court's order granting the new trial has rendered harmless any error committed during the first trial. Kelley, in effect, asks this court to render an advisory opinion on these issues. Because we conclude that a remand for trial is not warranted, we clearly need not address these issues.

Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir.1986). If the record, viewed in this light, could not lead a rational trier of fact to find for Kelley, there is no genuine issue for trial, and summary judgment is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578, 106 S.Ct. 1348, 1351, 89 L.Ed.2d 538 (1986); *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir.1990). If, on the other hand, the factfinder could reasonably find in Kelley's favor, then summary judgment is improper. *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511; *Lavespere*, 910 F.2d at 178.

In the context of summary judgment, the rules governing burden of proof are critically important. *Lavespere*, 910 F.2d at 178. As the moving party, Industrial bears the initial burden of establishing that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); *Lavespere*, 910 F.2d at 178. Industrial must sustain this burden by informing the court of the basis for its motion, and by identifying portions of the record which reveal that there are no genuine issues for trial. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552-53; *Lavespere*, 910 F.2d at 178. Once such a showing is made, however, the burden shifts to Kelley to set out specific facts in the record showing that a genuine issue exists. *Lavespere*, 910 F.2d at 178.

B.

[1-3] Under Louisiana law,[8] the manufacturer of a

[8] We note that Mr. Kelley's accident occurred prior to the effective date

defective product—that is, a product that is unreasonably dangerous to normal use—may be held strictly liable in tort for harm caused by the product. *See Halphen v. Johns-Manville Sales Corp.*, 484 So.2d 110, 113 (La.1986); *Bell v. Jet Wheel Blast*, 462 So.2d 166, 168 (La.1985); *Hebert* v. Brazzel, 403 So.2d 1242, 1244 (La.1981); *Weber v. Fidelity & Casualty Ins. Co.*, 259 La. 599, 250 So.2d 754 (1971). The non-manufacturer seller of a product, by contrast, generally may be held liable only for its negligent failure to warn consumers of the dangerous propensities of the product it sells. *See Hopper v. Crown*, 555 So.2d 46, 48 (La.Ct.App. 1st Cir. 1989) ("A non-manufacturer/seller in some instances has a duty to warn a purchaser of defects and/or dangerous propensities in the products he sells."), *rev'd on other grounds*, 558 So.2d 1117 (La.1990).[9]

(footnote 8 continued)
of the Louisiana Products Liability Act, La.Rev.Stat.Ann § 9:2800.51 *et seq.* (West 1991).

[9] There are, of course, exceptions to the general rule. For example, a non-manufacturer seller who holds a product out to the public as his own, or who qualifies as a "professional vendor," may be held to the same standard as a manufacturer. *See Chappuis v. Sears Roebuck & Co.*, 358 So.2d 926, 930 (La.1978); *Home Ins. Co. v. National Tea Co.*, 577 So.2d 65, 74 (La.Ct.App. 1st Cir.1990), *aff'd in part, rev'd in part on other grounds*, 588 So.2d 361 (La.1991); *Nelton v. Astro-Lounger Mfg. Co.*, 542 So.2d 128, 132 (La.Ct.App. 1st Cir.1989). Because Kelley does not seek recovery under either of these two theories, we need not concern ourselves with the details.

Kelley has argued, however, both at trial and before this court, that a non-manufacturer seller is subject to strict liability under § 402A of the Restatement (Second) of Torts. As the district court noted, however, Kelley has offered no Louisiana cases supporting her argument that strict products liability applies to non-manufacturer sellers. Moreover, Kelley's assertion at oral argument that the Louisiana Supreme Court's decision in *Bell v. Jet Wheel Blast*, 462 So.2d 166 (La.1985), supports her position is simply untenable. In that case, the Louisiana court addressed

[4-6] It is well-settled, for example, that the seller of a defective product may be liable in tort if he knew or should have known that the product was defective, and he failed to declare it. *Home Ins. Co. v. National Tea Co.*, 577 So.2d 65, 74 (La.Ct.App. 1st Cir. 1990), *aff'd in part, rev'd in part on other grounds*, 588 So.2d 361(La.1991); *Nelton v. Astro-Lounger Mfg. Co.*, 542 So.2d 128, 131 (La.Ct.App. 1st Cir.1989); *LeBleu v. Homelite Div. of Textron, Inc.*, 509 So.2d 563, 565 (La.Ct. App. 3rd Cir.1987); *Harris v. Atlanta Stove Works, Inc.*, 428 So.2d 1040, 1043 (La. Ct.App. 1st Cir.). *See also* LA.CIV.CODE ANN. art. 2545 (Liability of seller for concealment of vice). Moreover, even in the absence of a defect *per se*, some Louisiana courts have imposed upon the seller of a potentially dangerous product a duty to warn of the possible dangers involved in using that product. *Hopper*, 555 So.2d at 49; *American Ins. Co. v. Duo Fast Dixie, Inc.*, 367 So.2d 415, 417 (La.Ct.App. 4th Cir.1979); *Hoffoss v. Ralston Purina Co.*, 341 So.2d 605. 606 (La.Ct.App. 2nd Cir.1977); *Williams v. Allied Chemical*

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footnote 9 continued.
a narrow question certified by this court; whether the defense of contributory negligence applied to strict products liability claims under Louisiana law. *Id*, at 168. And, while some of the language of the decision might be read to suggest that "suppliers" could be subject to strict liability, *see id.*, the court clearly did not purport to address the issue of strict "seller" liability. Indeed, in the wake of *Jet Wheel Blast*, Louisiana courts have consistently stated that sellers of defective products are accountable only for their negligent failure to warn. *See Home Ins.*, 577 So.2d at 74; *Nelton*, 542 So.2d at 131; *LeBleu v. Homelite Div. of Textron, Inc.*, 509 So.2d 563, 565 (La.Ct.App. 3rd Cir.1987). Finally, it is noteworthy that in enacting the Louisiana Products Liability Act, La.Rev. Stat Ann. § 9:2800.51 *et seq.*(West 1991), which became effective September 1, 1988, the Louisiana legislature imposed strict liability only upon manufacturers and those sellers that would have qualified as "professional vendors" under prior case law. *See id.* at § 2800.53(1)(b) (definition of manufacturer).

Corp., 270 So.2d 157, 160 (La.Ct.App. 1st Cir.1972). A seller is not required, however, to inspect a product prior to sale to determine the possibility of inherent vices or defects which are not apparent. *Home Ins.* 577 So.2d at 74; *Nelton*, 542 So.2d at 131; *Harris*, 428 So.2d at 1043. And, unlike the manufacturer, the seller is not presumed to have knowledge of a product's vices. *Hopper*, 555 So.2d at 48; *Martin v. Henderson*, 505 So.2d 192, 195 (La.Ct.App. 3rd Cir.1987); *see also Weber v. Fidelity & Casualty Ins. Co.*, 259 La. 599, 250 So.2d 754 (La.1971).[10] Furth rmore, Louisiana courts have consistently held that a seller's duty to warn goes only to those dangers which are not obvious—the seller has no duty to warn of dangers of which the user is or should be aware. *Delanzo v. ABC Corp.*, 572 So.2d 648, 651 (La.Ct.App. 5th Cir.1990); *Hopper*, 555 So.2d at 49; *American*, 367 So.2d at 417; *see also Halphen*, 484 So.2d at 155 (limiting the duty of a *manufacturer* to warn to dangers which are not within the knowledge of or obvious to the

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[10] Industrial argues in its brief that it had no independent duty to warn of the dangers presented by the auger-equipped bin because the manufacturer, Price-Macemon, provided no warnings. According to Industrial, the failure of the manufacturer to provide sufficient warnings "serves to absolve" the seller of any liability for damages. Industrial cites *Delanzo v. ABC Corp.*, 572 So.2d 648, 651 (La.Ct. App. 5th Cir.1990) and *Elmwood Plantation, Inc. v. Ruud Water Heater Div.*, 435 So.2d 507 (La.Ct.App. 5th Cir.1983), in support of this proposition. In each of these cases, however, the court found that the seller had no independent duty to warn *because* there was no evidence that the seller knew or should have known of the defect that caused the injury. *See Delanzo*, 572 So.2d at 651; *Elmwood*, 435 So.2d at 512-13. If the manufacturers had furnished warnings, the sellers presumably would have had knowledge of the defect, or, at the very least, they would have been negligent in not forwarding the warnings to the consumer. Thus, these cases do not stand for the broad proposition asserted by Industrial. Rather, they merely apply the well-settled rule that a seller's duty to warn goes only to those defects or dangers of which it is or should be aware.

user); *Home Ins.*, 577 So.2d at 73-74 (same); *LeBleu*, 509 So.2d at 565 (same); *Ducote v. Liberty Mut. Ins. Co.*, 451 So.2d 1211, 1213 (La.Ct.App. 4th Cir. 1984) (same); *Lovell v. Earl Grissmer Co.*, 422 So.2d 1344, 1350 (La.Ct.App. 1st Cir. 1982) (same); *Thornhill v. Black, Sivalls & Bryson, Inc.*, 385 So.2d 336, 338 (La.Ct.App. 1st Cir.1980) (same), *aff'd*, 394 So.2d 1189 (La.1981).[11]

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[11] We note that effective August 1, 1980, Louisiana adopted a pure comparative fault system of tort liability. *See* La.Civ.Code Ann. art. 2323 (West Supp.1993). The Louisiana Supreme Court, in response to a question certified by this court, has stated that the statute serves to eliminate "the inequities inherent in the 'all or nothing' recovery rules that prevailed prior to the adoption of comparative fault." *Murray v. Ramada Inns, Inc.*, 521 So.2d 1123, 1133 (La.1988). specifically, the Louisiana court held that the defenses of contributory negligence and assumptioin of the risk "shall no longer operate as a complete bar to recovery" in negligence or strict liability cases. *Id.* Thus, according to the Louisiana Supreme Court, the "net effect of article 2323, as amended, is to prevent courts from applying any defense more injurious to a damage claim than comparative negligence." *Bell v. Jet Wheel Blast*, 462 So.2d 166, 170 (La.1985). The *Murray* court also expressly rejected the argument that the defendant "had *no duty* to protect the decedent from a danger of which he had knowledge" as an attempt to "inject" the assumption of the risk doctrine into the analysis "through the back door." 521 So.2d at 1136 (emphasis in original). Although the tension between Louisiana's new pure comparative fault system and the "obvious danger rule" is clear, to date, no Louisiana court has directly addressed the issue. Indeed, in cases decided after the effective date of article 2323, Louisiana courts have continued to recite the rule without comment. *See Delanzo*, 572 So.2d at 651; *Hopper*, 555 So.2d at 49; *see also Halphen*, 484 So.2d at 155 (limiting the duty of a *manufacturer* to warn to dangers which are not within the knowledge of or obvious to the user); *Home Ins.*, 577 So.2d at 73-74 (same); *LeBleu*, 509 So.2d at 565 (same); *Ducote*, 451 So.2d at 1213 (same); *Lovell v. Earl Grissmer Co.*, 422 So.2d at 1350 (same). In, *Hopper*, the only case actually decided on the issue of the obviousness of the danger, the Louisiana Supreme Court reversed without reasons. *See Hopper v. Crown*, 558 So.2d 1117 (La. 1990). In a concurring opinion, however, one Justice stated in dicta that "the seller might still prevail if the defect was obvious to the ordinary user." *Id.* (Lemmon, J., concurring). In light of the fact that the courts of

(7,8) In the case before us, Industrial moved for summary judgment on the issue of its liability as the seller of the auger-equipped ice bin on the grounds that it had no knowledge of any defect or dangerous condition prior to Jack Kelley's accident and, alternatively, that it had no duty to warn of an obvious danger. In support of its first argument, Industrial offered the affidavit of David McGowan, Industrial's president, in which he states that "[Industrial] had no knowledge of any alleged defects in any of the equipment, and [Industrial] was never aware of any alleged dangerous or unsafe condition in the equipment at any time prior to the accident involving Mr. Kelley." Industrial also offered excerpts from McGowan's trial testimony[12] in which he testified that he had no knowledge of any specific defect in the ice-storage bin. Specifically, he stated that he was not aware of the need for certain safety

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(footnote 11 continued)

Louisiana clearly have not rejected the obvious danger rule as inconsistent with comparative fault, and the fact that Kelley has not raised the issue, we need not decide how we think the Louisiana Supreme Court would resolve the issue if it were directly presented.

[12] In the usual case, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits submitted by the parties in support or in opposition to the motion constitute the summary judgment record. *See* Fed.R.Civ.P. 56(c). In the instant case, however, the district court, in adjudicating Industrial's motion for summary judgment, primarily relied upon the testimony offered at the prior trial. Although Rule 56 does not expressly contemplate the use of such evidence in granting summary judgment, we find no error in relying upon such evidence. It is well-settled that a certified transcript of a judicial proceeding may be considered on a motion for summary judgment. *See Langston v. Johnson*, 478 F.2d 915, 918 (D.C.Cir. 1973) (citing cases); *see also Randolph v. Laeisz*, 896 F.2d 964, 970 (5th Cir. 1990) (considering—without discussion—the testimony given during the trial of the main action on a motion for summary judgment in a servered

equipment and warning decals until after the accident.[13]

As Kelley pointed out in her response, however, McGowan's own testimony belies his assertion that he was not aware of "any allegedly dangerous or unsafe condition" in the auger-equipped bin prior to Jack Kelley's death. McGowan testified that he entered the bin on one occasion, along with Damas Demare, David Easley, and two others, for the purpose of "testing the movement of the augers and things like that" and that, while he was in the bin, he saw the auger "eat" a metal shoval. Demere described the incident as follows:

> [W]e had got into [the bin] to observe [the auger] running. There were some problems with the gearbox, problems with the sweep, and after we came out of that machine we expressed to anyone who would lend an ear 'Do not get in the manchine.' It's potentially lethal, We had seen what it would do that day. I believe David Easley was holding a shovel, and [the auger] pulled it out of his hand, and, you know, it was a revelation for us."

(footnote 12 continued)

action); *Downes v. Beach*, 587 F.2d 469, 471-72 (10th Cir. 1978) (holding that the record of the prior proceeding was properly considered on a motion for summary judgment after a new trial was granted). In the present case, a certified transcript of the prior trial was made part of the record.

[13] On October 29, 1987, nearly five months after Jack Kelley's fatal accident, Industrial received from Price-Macemon, the manufacturer of the ice bin and auger, a package containing interlock or "deadman" switches, warning decals, and instructions regarding the installation of the switches and the placement of the decals.

David Easley's version of the "shovel-eating" incident differs somewhat from Demere's, but the impact of the incident is no less apparent:

> Q. Were you—were you at the demonstration where Mr. McGowan and Mr. Oline were where the auger caught a shovel?
>
> A. Yeah, I'm the one who threw it in there.
>
> Q. You threw it in there. And why did you throw it in there?
>
> A. As a good demonstration.
>
> Q. And so it would chop it up and eat it up?
>
> A. It mutilated it.
>
> Q. And after it mutilated it[...] did this occur before Jack Kelley was killed?
>
> A. Yes.
>
> Q. And what steps did you take to see to it that the workers who worked in that area would work in a safe environment after that?
>
> A. I told everybody that would listen, as I testified earlier, that this was—this was a piece of equipment that could kill you.
>
> Q. And that's it?
>
> A. I don't know what else I could have done.

. . . . .

Q. Did you tell McGowan that?

A. McGowan saw it.

Based on what he saw that day in the ice bin, McGowan testified: "I think it was quite obvious that the equipment is dangerous." We agree with the district court that this testimony precludes summary judgment in favor of Industrial on the issue of its knowledge of the dangerous condition presented by the auger-equipped bin.

[9] The second theory offered in support of Industrial's summary judgment motion was that the auger-equipped bin presented a danger that was so obvious that Industrial had no duty to warn. As noted, *supra*, a seller's duty to warn goes only to those dangers which are not obvious—the seller had no duty to warn of dangers of which the user is or should be aware. *Hopper,* 555 So.2d at 49; American, 367 So.2d at 417. Insupport of this theory, Industrial primarily relied upon the teatimony of Damas Demere. According to Industrial, Demere testified that he was well aware of the danger posed by the auger, that everyone knew the auger could kill, and that he had warned all of the ice-plant employees, including Jack Kelley, to stay out of the bin. Indeed, according to Industrial, Demere told Kelley that he was not even to get on the platform on which the bin was situated. Industrial also stated generally that "Delton Demere, Steve Fillimich, David Easley, and David McGowan all testified that the potential danger of the auger was obvious." In granting summary judgment, the district court concluded that the testimony of these witnesses established that the auger in which Kelley had become entangled presented an obvious danger. After a careful review of the trial transcript, we agree,

for, even when we view the testimony, as we must, in the light most favorable to Kelley, we conclude that it could not lead a rational trier of fact to find in favor of Kelley on the issue of the auger's obvious danger.

As Industrial pointed out in its motion for summary judgment, Damas Demere, David Easley, and David McGowan each testified that he knew the auger-equipped ice bin was a very dangerous piece of equipment. This acute sense of dangerousness arose, at least in part,[14] from the shared experience of being inside the bin and watching the auger mutilate a metal shovel. According to Damas Demere, once they "had seen what it could do" they knew that the auger was "potentially lethal."

Delton Demere, on the other hand, did not witness the "shovel-eating" incident and, apparently, never had been inside the bin. Not surprisingly, Delton was not as adamant about the dangerousness of auger-equipped bin as were Damas, Easley, and McGowan. He conceded on cross-examination, however, that he had in a deposition that "[n]obody would have had any business being in that ice machine." He also testified that he thought Jack Kelley had been in the bin prior to the day of his accident.

Steve Fillimich, Jack Kelley's co-worker and the only ice-plant employee who testified, explained the problem

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[14] Of course, as the seller and installer of the ice-bin, McGowan and Easley also possessed knowledge about the product that an ordinary user would not have, and, at least arguably, a certain self-interest. *See Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 564 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984) (self-serving testimony is subject to especially searching scrutiny).

with the ice plant: "When the ice would settle at the bottom, if for a few days, it was hard to break. The auger would just eat in certain part, the top would not come down. It would just eat, and the ice would stay on top, so you had to go in there with a pick and break it, or a shovel." Fillimich testified that the only way to get the ice out of the bin was to go into the bin with the auger running, chop the ice, and feed it into the auger. He testified further that he had gone into the bin on at least two occasions to break up ice—he "figured" it "was part of his job"—and that other employees, including Jack Kelley, also had gone into the bin to chop ice, with the auger running, prior to the day of the accident.

Fillimich also stated that he knew that the auger, which swept the floor of the bin, presented a danger:

> Q. Okay. Now, when you were in there shoveling the ice, you knew you had to stay clear of that auger, didn't you?
>
> A. Yeah, common sense.
>
> Q. Common sense?
>
> A. Right.
>
> Q. Because you knew if you didn't stay clear of that auger what would happen?
>
> A. Very Dangerous.
>
> Q. Okay, Nobody needed to tell you that, did they?
>
> A. No.

According to Fillimich, he stayed clear of the auger by staying in front it, shoveling the ice, and moving back, always careful to watch the auger and keep his feet and shovel "clear."

Fillimich recounted that on the morning of the accident, he had turned on the delivery system, climbed into the ice bin, and started chopping ice. When Jack Kelley arrived for work that morning, Fillimich testified, "he took the shovel and he want in and I came out." According to Fillimich, he then went out to "run the ice into a truck." Precisely what happened inside the bin remains a mystery.

While it is not clear from the record that anyone ever told Jack Kelley to stay out of the auger-equipped bin,[15] the uncontroverted testimony of Fillimich and Delton Demere established that Jack Kelley had been in that bin, chopping ice and feeding it into the auger, prior to the day he was tragically killed. Thus, on the morning of July 5, 1987, when Jack Kelley climbed through the small service door on the ice bin, he knew what was inside. And, while he had not witnessed the shovel-eating incident as had Damas Demere, Easley, and McGowan, he nonetheless "had seen what it could do."

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[15] Both Damas Demere and David Easley testified that they had told "everybody who would listen" to stay out of the ice bin. Easley, after some equivocation, testified that he was "sure" he told Kelley. Demere testified that "Jack [Kelley] was present more than once when I told several people never to go inside that storage bin," that it was his "policy" that no employees were to go into the bin, and that he told Jack Kelley that he would be fired if he got "on the slab" again. Yet Demere also testified that, prior to Kelley's accident, he was not "aware" that employees were going into the bin and that "there was no set policy as far as saying don't get in." He also admitted that his warning to Kelley

[10] The question of whether Jack Kelley actually knew of the danger presented by the auger-equipped bin is, of course, a question of fact. Similarly, under Louisiana law, the question of whether the danger presented by the auger-equipped bin was obvious—that is, whether it presented a danger that should have been known to Jack Kelley under the circumstances is also primarily a question of fact. *Owens v. New Orleans Maintenance, Inc.*, 349 So.2d 494, 500 (La.Ct.App. 4th Cir. 1977). Nevertheless, in light of the uncontroverted evidence that those who observed the auger in operation were aware of its potential danger, that Kelley had been in the ice bin before, with the auger running, and that the auger was running when Kelley climbed into the bin on July 5, 1987, we must conclude that the record before us, even when viewed in the light most favorable to Kelley, could not lead a rational trier of fact to find that Jack Kelley should not be charged with knowledge of the auger's dangerousness. Under these circumstances, an ordinary user should have recognized the danger. *See Melton v. Deere & Co.*, 887 F.2d 1241, 1244 (5th Cir. 1989) (affirming a judgment n.o.v. and stating that "the risk that an auger may be engaged whenever the engine is running is a matter of common sense with which the a reasonable user of the combine must be charged"); *Gray v. Manitowac Co.*, 771 F.2d F.2d 866, 871 (5th Cir. 1985) (reversing and rendering judgment in favor of a

---

(footnote 15 continued)

regarding getting on the "slab" had nothing to do with going inside the bin, but arose from his concern that Kelley would again break a piece of machinery on the underside of the bin. According to Fillimich, he was never told that he should not go into the bin to break up the ice. Moreover, he testified that he never told Jack Kelley not to go into the bin and that, to his knowledge, no one else had ever told Kelley to stay out. This testimony, at best, creates a fact issue.

manufacturer on grounds that a reasonable jury could not have found that a danger was not open and obvious). Thus, because the record before us does not disclose a genuine issue of fact regarding the obvious nature of the danger that lay inside the ice bin, we find that the district court properly granted summary judgment in favor of Industrial on the issue of its liability as the seller of the Demere ice plant.

III.

In sum, we conclude that the record before us supports the district court's conclusion that the auger in which Jack Kelley became entangled on July 5, 1987, presented an obvious danger—that is, it presented a danger of which Kelley should have been aware. Thus, under Louisiana law, Industrial had no duty to warn of that danger. Because Industrial's tort liability as the *seller* of the ice-plant must arise, if at all, from its failure to warn of this dangerous condition, Industrial is entitled to judgment as matter of law. Accordingly, we AFFIRM the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
JUL 29 1993

No. 92-3511

CYNTHIA ANN KELLEY, Individually and on Behalf of Her Minor Children Jerred Seth Kelley and Cindy Lynn Kelley,
Plaintiff-Appellant,
Cross-Appellee,

versus

PRICE-MACEMON, INC., ET AL.,
Defendants,

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,
Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 06/15/93, 5 Cir., ____, ____ F.2d ____)

(July 29, 1993)

Before KING and EMILLO M. GARZA, Circuit Judges, and COBB*, District Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King

United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

RICHARD E. WINDHORST, JR.
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

June 29, 1993

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

NO. 92-3511 - KELLEY vs PRICE-MACEMON, INC., ET AL.

(D.C. No. CA-88-2862-K)

The following action has been taken in the above case:

(X) AN EXTENSION OF TIME has been granted to and including

* JULY 9, 1993

( ) for filing appellant's/petitioner's brief.

( ) for filing appellee's/respondent's brief.

( ) for filing reply brief.

(X) for filing petition for rehearing.

---

* Must be physically filed in this office by due date.

( ) Motion to consolidate granted.

( ) Motion to supplement or correct the record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief *amicus curiae* is granted.

( ) Joint motion as to time for filing briefs granted.

( ) Order enclosed has been entered.

RICHARD E. WINDHORST, JR., Clerk

BY: /s/ Linda Vaughs
Deputy Clerk

cc: Mr Henry L. Klein
Mr. Claude D. Vasser

LAW OFFICES
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FEDERICK P. HEISLER JAMES A WYSOCKI
(1938-1989)

OF COUNSEL:
CYRIL J. GRACIANETTE
HENRY L. KLEIN

JULY 9, 1993

FILED
JUL 8 1992

U.S. Court of Appeals
Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Attention: Richard Windhorst

RE: **Kelley v. Industrial, No. 92-3511, United States Court of Appeal, Fifth Circuit**

Dear Mr. Windhorst:

This confirms my conversation of this date with your staff regarding the filing of (a) appellant's application for

rehearing and (b) appellant's suggestion for en banc rehearing, both of which were to be simultaneously filed this date.

It is understood that appellant has been granted an extension for filing her application for rehearing and suggestion for en banc rehearing until and including July 14, 1993.

As requested, I am writing this letter to confirm this extension.

With kind regards, I remain

Very truly yours,

/s/ Henry L. Klein
HENRY L. KLEIN

HLK/el

cc: Claude Vasser, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Filed
JUL 14 1993

No. 92-3511

CYNTHIA KELLEY, individually
and on behalf of her minor children
Jerred Seth Kelley and Cindy Lynn Kelley
Plaintiff-Appellant

VERSUS

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,
Defendant-Appellee

Appeal from the United States District Court
Eastern District of Louisiana
No. 88-2862, Section "K"
Honorable George Arceneaux, Jr., Judge Presiding

PETITION FOR PANEL REHEARING ON BEHALF OF APPELLANT
Cynthia Kelley, individually
and on behalf of her minor children
Jerred Seth Kelley and Cindy Lynn Kelley

SUBMITTED BY:

HENRY L. KLEIN, ESQ. (#7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971
Attorney for Cynthia Kelley

OF COUNSEL:
HEISLER & WYSOCKI

SUMMARY OF ARGUMENT ON PANEL REHEARING

1. INDUSTRIAL DID *NOT* INCLUDE "OBVIOUS DANGER" AS AN ISSUE AS TO WHICH THERE WAS NO MATERIAL FACT, IN CONFORMITY WITH LOCAL RULE 2.09, AND THEREFORE DID NOT MEET ITS THRESHOLD BURDEN UNDER *CELOTEX CORP. V. CATRETT*, 477 U.S. 317, 325, 106 S.CT. 2548, 2553-54, 91 L.ED.2D 265 (1986).

2. EVIDENCE WEIGHING "HEAVILY AGAINST" DEFENDANT'S CONTENTIONS REGARDING "OBVIOUS DANGER" INCLUDED: (a) THE PHOTOGRAPH OF THE AUGER WHEN THE ICE LEVEL WAS LOW; (b) THE SPEED OF THE AUGER IN MAKING ITS 360° SWEEP OF THE BIN FLOOR; (c) KELLEY'S *NOT HAVING* SEEN THE SHOVEL-EATING INCIDENT; (d) THE SCARCITY AND LACK OF CLARITY OF EVIDENCE REGARDING KELLEY'S PRIOR ENTRY INTO THE BIN; AND (e) EVIDENCE THAT OTHERS DID NOT CONSIDER THE EQUIPMENT DANGEROUS.

3. PLAINTIFF DID RELY ON THE " PROFESSIONAL VENDOR" RULE. THE ISSUE WAS SPECIFICALLY RAISED AT LEAST 8 TIMES: (a) IN OUR PRE-TRIAL MEMORANDUM; (b) IN OUR CROSS-EXAMINATION OF DAVID McGOWAN; (c) IN OUR CROSS-EXAMINATION OF DAVID EASLEY; (d) IN OUR CROSS-EXAMINATION OF LAWRENCE OLINDE; (e) IN OUR JURY CHARGES; (f) IN OUR MOTION FOR JUDGMENT N.O.V.; (g) IN OUR ORIGINAL BRIEF TO

THIS COURT; AND (h) IN OUR REPLY BRIEF.

4. THE AFFIDAVIT FILED IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT WAS DIAMETRICALLY OPPOSED TO THE "OBVIOUS DANGER" ISSUE, WHICH WAS *NOT* INCLUDED IN THE STATEMENT OF UNCONTESTED FACTS.

5. BECAUSE McGOWAN SAW THE WARNING DECALS AT THE SHOVEL-EATING DEMONSTRATION, INDUSTRIAL WAS ADDITIONALLY NEGLIGENT FOR FAILURE TO REQUIRE THE LABELS TO BE PLACED NEAR THE ACCESS DOOR.

6. INDUSTRIAL'S LIABILITY AS A SELLER INCLUDED ITS FAILURE TO SUPPLY INTERLOCKS, DEADMAN CONTROLS AND EMERGENCY STOP DEVICES; THIS LIABILITY IS INDEPENDENT OF FAILURE TO WARN.

7. MATTERS WHICH ARE INTERLOCTUTORY IN NATURE ARE "MERGED" INTO THE FINAL JUDGMENT AND ARE REVIEWABLE UPON APPEAL OF THE FINAL JUDGMENT. ACCORDINGLY, THIS COURT'S SCOPE OF REVIEW IS NOT LIMITED TO JUST THE SUMMARY JUDGMENT.

8. "THE FEDERAL RULES REJECT THE APPROACH THAT PLEADING IS A GAME OF SKILL IN WHICH ONE MISSTEP BY COUNSEL MAY BE DECISIVE TO THE OUTCOME..." *CONLEY V. GIBSON,* 78 S.CT. 99, 103; 355 U.S. 41, 48. WE MADE ONE SUCH MISSTEP. IT APPEARS THAT MRS. KELLEY'S SUBSTANTIVE RIGHTS MAY HAVE BEEN AFFECTED AND WE RESPECTFULLY ASK FOR RECONSIDERATION.

PETITION FOR PANEL REHEARING

Cynthia Kelley respectfully petitions the panel of this Court for a panel rehearing on the following grounds:

Industrial's Threshold Burden/Local Rule 2.09. Industrial's motion did not sustain its threshold burden regarding the "open and obvious" issue, as required by *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986) and *Lavespere v. Niagara Mach. & Tool Works, Inc.* 910 F.2d 167, 178 (5th Cir. 1990), *inter alia.* It is fundamental that unless the mover sustains its *initial* burden, the motion cannot be granted, whether opposed or unopposed. The foundation for any motion for summary judgment begins with the "Statement of Uncontested Material Facts." Local Rule 2.09 provides as follows:

> "2.09 ***Motions for Summary Judgment*** Every motion for summary judgment *shall* be accompanied by a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried."

Since this panel has ruled that there was no issue of fact regarding the obvious nature of the danger, it was mandatory for Industrial to have made such a statement in connection with its motion. Otherwise, the issue is not raised, *ab initio.* Here, Industrial *did not comply with Rule 2.09* and did not state, as an uncontested material fact that the danger was "obvious." In our original brief, we clearly raised the issue of Industrial's incomplete "Statement of Uncontested Facts"[1]. For the court's convenience, we restate

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[1] *Original brief,* pp. 37, *et seq.*

Industrial's 2.09 certification, and beg the Court to recognize that Industrial did *not* contend that the issue of "open and obvious danger" was uncontested (001673):

> ***"STATEMENT OF UNCONTESTED FACTS***
>
> I.
>
> The accident which forms the basis of this suit occurred on July 5, 1987.
>
> II.
>
> The accident occurred in an ice storage bin manufactured by Price-Macemon/Rochester Silo.
>
> III.
>
> The ice storage bin was not manufactured by Industrial Refrigerated Systems, Inc. Instead, Industrial Refrigerated Systems, Inc. acted only as the retail seller of the ice storage bin."

As the Court can see, *no* statement is made to the effect that the danger was "open and obvious". That issue, therefore, was *never* before the District Court or before this Court, which views the granting of a summary judgment *de novo*. We cannot be required to respond to an issue not properly raised.[2].

Although we have worked very hard to represent the

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[2] Actually, Industrial's supporting affidavit suggests *the opposite*. McGowan's assertion was that "...IRS was never aware of any alleged dangerous or unsafe condition..." See point 4, *infra*.

interests of Jack Kelley's widow and children, we received harsh treatment[3] because we failed to meet the letter of the Local Rules regarding the filing of our opposition. Might we ask this Court to apply Rule 2.09 to the case at bar? Putting the issues clearly before the Court, and the opposing party, is not only a matter mandated by the Local Rules, but is the law of the land. *Celotex, supra.*

2. "Obvious Danger." Notwithstanding the fact that Industrial did not make "obvious danger" an issue of uncontested material fact, as set forth above, this Court has decided that the danger of entanglement was so "obvious" and that the evidence was so "uncontroverted" that summary judgment was proper on this issue.

It is apparent that the shovel-eating incident played a leading role in the Court's decision. With all due respect, however, there was a *substantial* difference between the auger's appearance at the "shovel-eating" demonstration and the auger's appearance when it was covered with 18 inches of ice.

For this very reason, we gave the Court, during our oral argument, a copy of the photograph which had been presented to the District Court during trial, and which the District Court relied upon in granting a new trial. At 001779 (Excerpt 17), the District Court made the following finding, which we respectfully submit was correct:

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[3] Although the District Court stated that it considered the motion on its merits, a major part of the Court's Memorandum Opinion of May 25, 1992 was devoted to excoriating plaintiff's counsel. We don't believe Mrs. Kelley's rights were objectively considered.

"The weight of the evidence did support the fact that other persons routinely entered the ice machine to assist in ice-making operations; *other evidence placed in dispute the decedent's knowledge of the allegedly obvious danger.* More importantly, the court has viewed a photograph submitted to it during the trial, which plaintiff's counsel failed to include in the pre-trial order and never offered into evidence (Record 248), *which weighs heavily against defendant's contentions regarding the obvious danger posed by the ice machine.*"

When the subject motion was filed in April of 1992, this photograph, *together with all of the evidence which had already been adduced at trial,* was before the District Court. At the risk of losing a valuable page of our limited length on rehearing, we reproduce herein the picture of how the danger was hidden:

In reaching its decision, this panel has given great consideration to the evidence regarding the danger of the auger when the bin was empty, i.e. to the shovel-eating incident. The auger, however, gave a different appearance when the bin had ice. This difference was significant and created, at the very least, an issue of fact. But there was more than just the photograph:

2(a) The Level of the Ice when Kelley was Killed. Consistent with the appearance of the photograph at page 4 of this petition, Steve Fillimich testified that *on the day of the accident,* the ice level was "Low. About 18 inches." (Vol. 8, p. 44) He also testified that the shovelling process had to take place while the auger was on, otherwise, "You wouldn't accomplish nothing" (p.45). The testimony of Fillimich regarding the level of the ice, coupled with the photograph, does indeed "weigh heavily against the defendant's contentions regarding the obvious danger posed by the ice machine," as the District Court observed in granting a new trial.

2(b) The Speed of the Auger. The speed with which the auger circled the bin would also mask the hidden danger of the auger. Damas Demere, in describing how the entire ice plant was *not functioning properly,* testified about the speed of the auger, at page 75, line 13:

> "And basically the two screws are unstoppable as far as for rotating, but they would not sweep the room. *Every 20 minutes it's supposed to make a total, 360 degree lap of that room.* When the ice got hard, it simply would not advance, and the gear to do that with, to advance it, was outside the building. and you could

> put a wrench on it, and you put a little body weight on it, you could make it sweep into the ice. But the machine alone wasn't capable of doing it."

Thus, the auger was sweeping the bin at a speed *slower* than 20 minutes per each 360 degrees. By the mere fact that the auger needed assistance, it is obvious that the auger was moving slowly, a fact that would dictate against the defendant's claim of open and obvious danger.

2(c) "...had seen what it could do." At page 4652 of this Court's decision, it is said (with quotation marks) that Jack Kelley "...had seen what it could do," apparently (?) referring to the shovel-eating incident. We have reviewed the testimony and cannot find any witness making such a statement, which would have been inadmissible conjecture. The Court's Opinion makes no reference by footnote or otherwise to the record or to the testimony quoted. Nor can we find any evidence in the record to support this Court's conclusion that when Kelley climbed into the ice bin "...he knew what was inside." Since he wasn't at the demonstration, he certainly had not "seen what it could do" to a shovel!

Apparently, this Court believes that Jack Kelley *purposefully* subjected himself to the mercy of a "man-eater" (as Judge Cobb described it) without regard for his own safety. The testimony at trial, however, established that Jack Kelley was a diligent worker, trying to do his job, and no more[4]. The testimony also established that many other employees of Delton's One Stop had to do the same, and none were prohibited from shoveling ice[5].

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[4] *Delton Demere,* at 92; *Fillimich,* at 66; *Wayland Demere,* at 109.

[5] *Fillimich,* at 36; *Delton Dewmere,* at 92; *Wayland Demere,* at 109.

Perhaps our point is better made by asking the question: Why in the world would these other men enter the bin to shovel ice into the auger if it was so obviously dangerous? Certainly, one reasonable *inference* would be that the danger was *not* "obvious." This Court must review the evidence, "...as well as the inferences that may be drawn from the evidence, in the light most favorable to the party that opposed the motion for summary judgment." *Little v. Liquid Air,* 952 F.2d 841 (5th Cir. 1992), and authorities cited.

2(d) Scant Evidence Regarding Kelley's Prior Actions. There was no evidence that Kelley had ever been in the bin *except when the auger was covered or partly covered with ice* as shown in the photograph presented to the Court. But even the evidence that he had *ever* gone inside the bin before his accident was scant and undeveloped. In support of a decision affirming summary judgment, this Court stated, at 4652, that:

> "...the uncontroverted testimony of Fillimich and Delton Demere *establishes* that Jack Kelley had been in that bin, chopping ice and feeding it into the auger prior to the day he was tragically killed."

Our review of the testimony, however, indicates that Delton Demere was equivocal, and hardly gave the type of testimony of which summary judgments are made, at Vol. 8, page 91, line 21:

> "Q. Do you know whether or not Jack *actually* had been into the bin to chop up ice on a date prior (to) the time he was killed? Do you

know if that was his first time that he was doing it or —

A. I *think* he had been there before, yes, sir."

As for Fillimich, the issue was equally undeveloped and, at best, placed Kelley in a position to see what is depicted in the photograph at page 4 of this brief, at Vol. 8, page 37:

"Q. Okay. Do you know for a fact whether or not Jack Kelley ever went into that silo before the day that he was killed?

A. I couldn't — lots of times we worked in shifts. He *might* have gone before.

Q. I know. Do you know whether or not he actually went into the silo before he was killed?

A. He went before."

There was no further development, on cross-examination, to amplify on this issue. This testimony certainly does not have the clarity required as a foundation for summary judgment. But even if it is accepted that Kelley had shoveled ice before, the only conclusion that can safely be made is that he saw an auger covered or partly covered with ice!

2(e) Other Evidence Weighing Against a Finding of "Obvious Danger." the District Court was also correct in stating that "other evidence placed in dispute the de-

cedent's knowledge of the alleged obvious danger", *supra*.

At page 274, Vol. 10 of the Trial Record, Lawrence Olinde, the sales representative for Industrial Refrigerated Systems, Inc. testified that, when making his sales pitch, he didn't think he was dealing with a dangerous piece of equipment. The only thing that changed his mind was Kelley's death, beginning at line 15:

"A. *I didn't think it was a dangerous piece of equipment.*

Q. Today as we speak, do you think it's a dangerous piece of equipment?

A. I would think so.

Q. And you didn't know it then?

A. *No, sir.*

Q. And why do you know it now?

A. Because someone got killed in it."

At page 184, Vol. 10, Damas Demere testified that Jack Kelley had been at the seafood company until just 3 or 4 weeks prior to his accident, when he moved to Delton's One Stop. At page 186, Demere confirmed that Kelley received "no training." Finally, at page 203, Demere described how the bin was not easily accessible.

As the Court knows, a worker was required to climb through a small opening in order to enter the bin. Whatever

danger lurked inside that bin was certainly not "open." Indeed, the defendant made a great effort to illustrate how *inaccessible* the auger was. At page 52 of the cross-examination of Steve Fillimich, for example, the following colloguy took place:

"Q. There was no steps or anything —
A. No.
Q. —to allow you to climb up to this hatch?
A. No.
Q. And you had to get a stool because you couldn't reach it otherwise; is that right?
A. Right, right.
Q. Well, whose idea was it to begin with to get a stool?
A. Well, we had one there. The only way, you have to jump to get to it.
Q. Yes. Do you know who put the stool there?
A. I probably put it myself.
Q. Do you know where you got it?
A. Somewhere around the store."

The truth of the matter is that Kelley, as many others, was not aware of the danger. Nor was the danger obvious when the plant began producing ice. These were all, at the very least, questions of fact. In *Little v. Liquid Air,, supra,* this Court held, at 847, that "Summary Judgment is rarely appropriate in negligence and products' liability cases, *even if the material facts are not in dispute.*" We respectfully submit that the issue of *Jack Kelley's knowledge* was a fact issue. and because so many others did the same, the "obvious" nature of the danger, *hidden by 18 inches of ice,* was particularly insusceptible of summary judgment.

3. "Professional Vendor." This Court found that Industrial's liability was limited to a duty to warn, which duty was absolved because the danger was obvious. As the Court noted at Footnote 9, such a rule does not apply to a "professional vendor." This is correct. We respectfully submit that the court erred, however, in concluding that "...Because Kelley does not seek recovery under either of these two theories, we need not concern ourselves with the details."

We *did* rely on the "professional vendor" doctrine. Indeed, Industrial *was* in the "business" of selling ice plants and we often made the point. Testimony was adduced to show that Industrial was a "professional vendor"[6], and we often emphasized that Industrial's letterhead described the company as:

"AMMONIA & FREON
REFRIGERATION SPECIALISTS."

In our pre-trial memorandum, Excerpt 11, we specifically relied upon the law applicable to "professional sellers", stating, at 001338[7]:

---

[6] *David Easley,* at 346, *et seq; David McGowan,* at 304 *et seq; Lawrence Olinde,* at 265 *et seq.*

[7] See also, pre-trial memorandum, at 001336, where we urged that Industrial was liable as a "supplier," thus:

> "The existing law was most thoroughly contained in the Supreme Court decision of *Halphen v. Johns Manville Sales Corp.,* 484 So.2d 110, which held, at 1114, that:
>
> 'A manufacturer *or supplier* who sells a product with a construction or composition flaw, is subject to liability *without proof that there was any negligence on its part in creating or failing to discover the flaw.*' "

> "Thus, if INDUSTRIAL *was engaged in the business of selling 'refrigeration systems'*, and if the system sold was 'unreasonably dangerous', and remained substantially unchanged from sale to injury, INDUSTRIAL is liable as a "seller," notwithstanding its separate liability as a 'manufacturer'."

It was specifically with the "professional vendor" issue in mind that we conducted the following cross-examination of David McGowan, Vol. 7, at page 31:

> "Q. You were, were you not, in the business of selling refrigerated systems?
>
> A. Equipment, yes.
>
> Q. You were in the business of selling ice plants or selling the equipment that's necessary to put together an ice plant?
>
> A. I sold equipment, yes.
>
> Q. Well, you were selling equipment related to the refrigeration and ice business?
>
> A. Yes.
>
> Q. That's what you did for a living?
>
> A. That's right. But I didn't put them together[8].

---

[8] The reason was that Industrial did not have a Louisiana contractor's license. McGowan testimony, Vol. 7, at 9.

"Q. I asked you whether you were in the business of selling refrigeration and ice equipment.

A. That is correct.

Q. Refrigeration and ice equipment that is necessary to put into an ice plant?

A. That's correct.

Q. Part of the component parts?

A. That's right."

In our jury charges, we submitted a specific jury charge on the issue. For the Court's convenience, our jury charges are included as Appendix "A" to our Reply Brief. Jury Charge No. 1 Specifically refers to a seller "...engaged in the business of selling ice plants..."

In our Motion for Judgment N.O.V., we again specifically relied on liability vested upon "professional vendors", stating at 001155 (Excerpt 15):

> "As the Court will surely recall, our Motion for a Directed Verdict was not 'wasted' on manufacturer liability, where there *was* conflicting evidence, but was *genuinely* made as to seller liability, where no reasonable men could differ with the proposition (a) that INDUSTRIAL was a 'seller', (b) ***that INDUSTRIAL was in the 'business' of selling ice plants and their components,*** (c) that this plant (or the auger/bin component thereof) was defectively designed and /or unreasonably dangerous and (d) that Jack Kelly was killed by the product sold."

In our original brief to this Court, we made specific reference, at page 8, to the fact that Industrial held itself out to be "Refrigeration Specialists", and we detailed, at footnotes 4 through 11, the testimony of various witnesses regarding the "sales pitch" made to the unsophisticated Demere family.

In our reply brief to this Court, at page 1, we specifically challenged Industrial's statement that they were not a 'professional vendor" by making reference to the testimony of seven witnesses: Scotty Chabert, Joey Adams, Delton Demere, Wayland Demere, Damas Demere, Lawrence Olinde and Dave McGowan.

Obviously, *we did rely upon a theory of liability on the part of Industrial as a "professional vendor"* and this Court's conclusion to the contrary is in error. It is respectfully submitted that the factual issues regarding Industrial's status as a "professional vendor" precluded summary judgment, that Industrial was "in the business" of selling refrigerated systems, and that Industrial is therefore subject to liability as a "professional vendor".

4. McGowan's Affidavit: Inconsistent with "obvious danger" Finding. In motions for summary judgment, the most important pleading is the statement of uncontested facts. After that come the affidavits submitted in support of such a motion. Here, Industrial submitted the affidavit of David McGowan, which *denied awareness* of "...any alleged dangerous or unsafe condition in the equipment at any time prior to the accident involving Mr. Kelley." This assertion, may it please the Court, is *diametrically opposed* to the asertion that the danger was "obvious"!

It appears that Industrial has now succeeded in winning a motion for summary judgment (a) on fact issues which it did not list in accordance with Local Rule 2.09 and in accordance with the rule of *Celotex, supra*, and its considerable progeny, and (b) on grounds diametrically opposed to the affidavit which it filed in support of its motion!

We believe reconsideration is warranted.

5. Negligence Independent of "Duty to Warn." This Court properly recognized additional bases for seller liability, independent of the "duty to warn", at footnote 10:

> "If the manufacturer had furnished warnings, the sellers presumably would have had knowledge of the defect, or, at the very least, *they would have been negligent in not forwarding the warnings to the consumer.*"

Evidence regarding this issue was discussed in our Original Brief, at pp. 12-14. At footnote 16, we quoted the testimony of David McGowan (Excerpt 16, p. 34) which we repeat here:

> "Q. And were you aware at that time (the shovel-eating demonstration) of the existence of the type of warning decals that were received in October?
>
> A. *I saw warning decals when I was there.*"

Accordingly, the issue of Industrial's failure to use the warning decals *was* an issue of fact, and *was* developed at trial. Additionally, we submitted to the District Court,

before trial, state-of-the-art literature which required the warning to be placed "next to the access door" of any structure containing an auger[9]. Indeed, it is Louisiana law that the warnings must be placed "in a manner likely to catch the user's attention..." *Easton v. Chevron*, 602 So.2d 1032 (4th Cir. 1992), at 1037.

Since McGowan testified that he saw the warning decals when he was at the plant in May, the failure to require the decals to be placed near the access door was negligence.

Particularly after the auger ate the shovel.

6. Other Legal Theories of Liability. Summary judgment is inappropriate if the mover is not entitled to judgment, *as a matter of law*. This ice storage system, sold by Industrial, was also defective for lack of interlocks, deadman controls and emergency stop devices. (See footnote 9) Because Industrial did not address these issues in its Rule 2.09 statement of undisputed facts, these theories were not briefed to the District Court. Prior to trial and in connection with our Jet-Wheel motion, we made the court aware of these additional bases for Industrial's liability. In our pre-trial memorandum and in our jury charges, we included the concept that a seller is negligent "...if he fails to otherwise protect users against such danger." Pre-trial Memorandum, p. 5 (001340)

7. The 'Merger" Doctrine. This Court has ruled that

---

[9] *Application of Interlocks, Deadman Controls and Emergency Stop Devises As a Design Strategy to Reduce Risk Associated with Agricultural Machinery*, J.B. Sevart, 3/19/82 (000888, Excerpt 2).

certain issues raised in our briefs were not before the Court because the appeal was taken from the judgment of dismissal. It is respectfully submitted that matters which are interlocutory in nature are "merged" into the final judgment and are reviewable upon appeal of the final judgment. While we find no Fifth Circuit cases on point, *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976) appears to answer this question, citing *9 Moore's Federal Practice* ¶*110.18*.

*8. **Conclusion.*** "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome..." *Conley v. Gibson*, 78 S.Ct. 99, 103; 355 U.S. 41, 48. We made one such misstep.

It appears that Mrs. Kelley's substantive rights may have been affected. We respectfully ask for reconsideration for the reasons set forth above.

Respectfully submitted:

/s/ Henry L. Klein

HENRY L. KLEIN, ESQ.
Bar No. 7440
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by hand delivery, FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on the 14th day of July, 1993.

/s/ Henry L. Klein

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
OCT 10-91

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * * *

MOTION TO SUBMIT PHOTOGRAPH TO THE COURT

AND NOW INTO COURT, through undersigned counsel, comes plaintiff, Cynthia Ann Kelley, individually, an on behalf of her minor children, Jerred Seth Kelley and Cindy Lynn Kelley, and moves for leave to submit the annexed photograph to the Court, in connection with the pending *in limine* motion regarding the *Jet Wheel Doctrine.*

Mover suggests that the photograph is indicative of the way the auger appeared at the time Jack Kelley entered the silo and mover suggests that the photograph does not depict an obvious danger but rather masks the lethal nature of the auger.

DATE OF ENTRY Oct 10 1991

Respectfully submitted,

/s/ Henry L. Klein

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APPENDIX E

MINUTE ENTRY
ARCENEAUX, J.
NOVEMBER 13, 1991

FILED
NOV 13 91

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KELLEY, ET AL. **CIVIL ACTION**

VERSUS **NO. 88-2862**

RICE-MACEMON, INC., ET AL. **SECTION "K" (1)**

Plaintiff, Cynthia Ann Kelley, individually and on behalf of her minor children, Jerred Seth Kelley and Cindy Lynn Kelley, filed a motion for judgment notwithstanding the verdict or, in the alternative, a new trial in the above-captioned matter and noticed it for hearing on November 13, 1991. Having reviewed the memoranda in support, the opposition memoranda, and the applicable law, the court finds the motion for a new trial as to seller's liability to have merit.

This matter proceeded to trial on October 7, 1991. At the conclusion of the trial, the jury found for the defendant, Industrial Refrigerated Systems, Inc. ("Industrial").

DATE OF ENTRY NOV 14 1991

Specifically, the jury answered questions regarding Industrial's status as a manufacturer and negligence as a seller in the negative. Plaintiff now seeks a judgment notwithstanding the verdict as to seller liability or, in the alternative, a new trial on both Industrial's liability as a manufacturer and seller of the ice machine at issue.

1. Judgment Notwithstanding the Verdict

Rule 50(b) of the Federal Rules of Civil Procedure provides that, when a court does not grant a party's motion for a directed verdict at trial, a party may move within ten days after entry of judgment to set aside the jury verdict and have judgment entered in accordance with the party's motion. Fed. R. Civ. P. 50(b). The United States Court of Appeals for the Fifth Circuit has made clear the standard for deciding such a motion. In *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), the court stated:

> On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the mo-

> tions should be denied, and the case submitted to the jury.

Id. at 374-75; *see Lee v. Wal-Mart Stores, Inc.*, 943 F.2d 554, 557 (5th Cir. 1991). In this case, plaintiff has timely filed her motion for judgment notwithstanding the verdict, and the court has reviewed it based on the jurisprudence above.

Ms. Kelley, in support of her argument as to seller liability, contends that the jury most likely misapplied the law to the facts of this case with respect to the duty to warn imposed upon a seller. While the evidence may have shown Industrial, as a seller, knew or should have known of the ice machine's defect, the evidence does not meet the exacting standard necessary for judgment notwithstanding the verdict; it does not so conclusively prove that the defendant breached a duty to warn as to warrant a judgment notwithstanding the verdict. The court, therefore, finds that "reasonable and fair-minded" jurors could have reached differing conclusions as to Industrial's negligence in allegedly failing to warn of the machine's alleged defect.

The court, in viewing the evidence in a light most favorable to Industrial, holds that the weight of the evidence at this trial does not support plaintiff's motion. For this reason, the court finds plaintiff's arguments for judgment notwithstanding the verdict to be unpersuasive.

2. A New Trial

Plaintiff, in the alternative, asks that the court consider granting a new trial. In support, Ms. Kelley argues

that, under the evidence presented, liability could have been imposed on Industrial as a manufacturer or a seller of a defective product.

A court may grant a new trial "to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the court of the United States . . . ." Fed. R. Civ. P. 59(a). The Fifth Circuit has noted that this rule does not specify the grounds for a new trial, but one "may be granted, for example, if the district court finds the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985). Under this legal standard and the facts before it, the court finds grounds present to grant a new trial.

In arriving at this conclusion, the court has examined the charges presented to the jury and finds that error may have indeed occurred of such magnitude as to persuade the court to grant the motion.[1] Plaintiff opines, and the court agrees, that the jury may not have had an adequate explanation of the duty to warn imposed upon a

[1] In so doing, the court notes that the parties failed to offer proposed jury instructions that could either appropriately or properly be used by the court. For example, plaintiff relied (and continues to rely) on the *Restatement of Torts 2d* even though counsel provides no support under Louisiana law for the use of that authority in this case (other than a single dissenting opinion). Defendant, on the other hand, did not offer proposed charges on the issue of products liability. The court, however, must view its instructions under the applicable law to make a proper determination on the issue of a new trial irrespective of the parties' failings.

seller in Louisiana. The testimony of David McGowan, Industrial's president, clearly indicates that he knew or should have known of the defect in the ice machine. Furthermore, the overwhelming weight of the evidence surely shows that Mr. McGowan, as the seller's corporate representative, failed despite such knowledge to provide adequate warnings about the ice machine's defects.[2] The jury, however, was without a proper explanation as to the duty imposed upon a seller to warn.

Defendant, in opposition, argues that the Louisiana case of *Thornhill v. Black, Sivalls & Brison, Inc.*, 385 So. 2d 336 (La. Ct. App. 1st Cir. 1980), *aff'd*, 394 So. 2d 1189 (La. 1981) (wrongful death action involving manufacturer and seller of screw-type auger), supports the position that no duty may be imposed upon a seller where the danger is obvious. For further support, Industrial argues that only constructive knowledge of such obvious danger is necessary. *See Ducote v. Liberty Mut. Ins. Co.*, 451 So. 2d 1211 (La. Ct. App. 4th Cir.), *cert. denied*, 457 So.2d 15 (1984) (wrongful death case involving manufacturer). While the court makes no findings on these issues of fact and law, the weight of the evidence at trial did not adequately prove that the ice machine (and, particularly, the auger-equipped bin) posed such an obvious danger or that the decedent was so aware thereof as to relieve Industrial of its duty to warn.

The weight of the evidence did support the fact that

---

[2] Defendant argues that Mr. McGowan and others knew of the auger's obvious danger and provided adequate warnings. The weight of the evidence, however, does not sustain defendant's contention that others knew of the obvious danger where employees regularly entered the ice silo as part of their duties or that Industrial provided warnings adequate to meet the requisites of Louisiana law.

other persons routinely entered the ice machine to assist in ice-making operations; other evidence placed in dispute the decedent's knowledge of the allegedly obvious danger. More importantly, the court has viewed a photograph submitted to it during the trial, which plaintiff's counsel failed to include in the pre-trial order and never offered into evidence (Record 248), which weights heavily against defendant's contentions regarding the obvious danger posed by the ice machine. While the failure to offer this evidence has played no part in the court's determination as to the need for a new trial, it nevertheless constitutes factual evidence that bolsters what the court believes to be an otherwise appropriate decision.

The court, in conclusion, notes it did not hold a jury charge conference prior to closing arguments. Rule 51 of the Federal Rules of Civil Procedure states that the court should inform counsel of its rulings with regard to requested jury instructions prior to closing arguments. *See* Fed. R. Civ. P. 51. While the dearth and lack of appropriate quality of the proffered charges would have made such conference for such purpose an empty and meaningless formality, and the lack of such conference for such purpose is not reversible error, the court finds that such omission could have perhaps given plaintiff's counsel a forum to articulate the objections he has now found voice to present concerning specific instructions on seller liability.[3]

---

[3] The court, in raising this issue, again notes that its failure to punctiliously follow the Federal Rules of Civil Procedure in this respect occurred because of the attorneys' less-than-helpful requested charges. *See supra* note 1. In fact, at the close of the charges at trial and in a memorandum supporting this motion, counsel for plaintiff has praised the court on the charges and, further, never has raised the issue of whether such a conference should have been held.

However, the weight of the evidence and possible error discussed above could only have affected the jury's findings as to seller liability. The evidence and record clearly show substantial support for the jury verdict absolving Industrial of fault as a manufacturer, and the court finds no error in its charge on that claim. Conversely, the court is convinced that a maifest injustice has occurred with respect to Industrial's possible liability as a seller of a dangerous product, including, specifically, the issue of this defendant's failure to warn.

The court, therefore, finds a new trial is necessary limited solely to the issue of seller's liability. To that extent, the plaintiff's motion is **GRANTED**.

The Courtroom Deputy shall hold a preliminary pre-trial conference to schedule dates for a new pre-trial conference and trial. Deadlines for conducting discovery and the filing of pre-trial pleadings shall remain closed. A revised pre-trial order for a trial on seller's liability, however, shall be confected and submitted in accordance with this court's rules.

IT IS SO ORDERED.

/s/J. Arceneaux

UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
APR 10 92

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
	*	
VERSUS	*	NO. 88-2862
	*	
PRICE-MACEMON, INC., ET AL	*	SECTION "K"
	*	

* * * * * * * * * * * * * * * * * * * *

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes defendant, Industrial Refrigerated Systems, Inc., who moves this Honorable Court for Summary Judgment in accordance with Federal Rule of Civil Procedure 56 for the reason that under the pleadings, depositions, admissions, Answers to Interrogatories and Affidavits, there is no genuine issue as to any material fact and that the moving party is entitled to Judgment as a matter of law.

WHEREFORE, defendant, Industrial Refrigerated Systems, Inc., requests that its Motion for Summary Judgment be granted, dismissing the plaintiffs' suit at their sole cost.

Respectfully submitted,

/s/ Claude D. Vasser

CLAUDE D. VASSER(#19278) T.A.
LEIGH ANN SCHELL (#19811)
VASSER & TRINCHARD
Suite 2030, 601 Poydras Street
New Orleans, Louisiana 70130
(504) 523-3795
Attorneys for Defendant,
Industrial Refrigerated Systems,
Inc.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
	*	
VERSUS	*	NO. 88-2862
	*	
PRICE-MACEMON, INC., ET AL	*	SECTION "K"
	*	

* * * * * * * * * * * * * * * * * * * *

STATEMENT OF UNCONTESTED FACTS

NOW INTO COURT, through undersigned counsel, comes defendant, Industrial Refrigerated Systems, Inc., who states that the following facts are not in dispute or concerning which there is no material dispute in connection with its motion for summary judgment:

I.

The accident which forms the basis of this suit occurred on July 5, 1987.

II.

The accident occurred in an ice storage bin manufactured by Price-Macemon/Rochester Silo.

III.

The ice storage bin was not manufactured by In-

dustrial Refrigerated Systems, Inc. Instead, Industrial Refrigerated Systems, Inc. acted only as the retail seller of the ice storage bin.

Respectfully submitted,

/s/ Claude D. Vasser

CLAUDE D. VASSER(#19278) T.A.
LEIGH ANN SCHELL (#19811)
VASSER & TRINCHARD
Suite 2030, 601 Poydras Street
New Orleans, Louisiana 70130
(504) 523-3795
Attorneys for Defendant,
Industrial Refrigerated Systems,
Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 10th day of April, 1992, served a copy of the above and foregoing pleading on all counsel of record, either by hand delivery or by placing same in the U. S. Mail, properly addressed and postage prepaid.

/s/ Leigh Ann Schell

LEIGH ANN TSCHIRN SCHELL

AFFIDAVIT

STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, personally came and appeared David McGowan, a person of the full age of majority, who after being duly sworn, did depose and say:

That he is Vice-President of Industrial Refrigerated Systems (IRS); that with respect to the attached sales contract of January 5, 1987, IRS neither designed, manufactured, operated or maintained any of the equipment described in the sales contract; that IRS placed an order for the equipment to the manufacturer of the ice machine, Turbo Refrigeration Company, and the manufacturer of the ice storage bin, Price-Macemon/Rochester Silo, Inc.; that the equipment was shipped directly to the ice plant site by the manufacturers; that during installation of the equipment, a representative of Price-Macemon/Rochester Silo, Inc., Wallace Macemon, recommended that dewatering screws be installed on the ice storage bin; that the cost of this additional item, which was not included in the original equipment shipped by Price-Macemon/Rochester Silo, Inc., was paid for by IRS, and not rebilled to Demere since it was a minor expense item; that all other costs for purchase of the equipment was billed by IRS to Demere and paid by the Demeres, that all costs for the installation of the equip-

EXHIBIT
"A"

ment, including all personnel hired to install the equipment, were arranged for and paid for entirely by the Demeres, and the Demeres hired David Easley of Boyd Refrigeration as the contractor to coordinate and supervise the installing of the equipment and the construction of the ice plant, and other contractors were hired to construct a foundation structure for the plant, based on plans drawn by David Easley; that an on-site technical representative, provided by and paid for by Price-Macemon/Rochestser Silo, Inc., was present during construction of the ice plant to provide technical assistance in the proper installation of their equipment; that at the time of the sale of the Turbo Refrigeration Company ice making machine, and the Price-Macemon/Rochester Silo, Inc. ice storage bin, and all related equipment to the Demeres, IRS had no knowledge of any alleged defects in any of the equipment, and IRS was never aware of any alleged dangerous or unsafe condition in the equipment at any time prior to the accident involving Mr. Kelley.

David McGowan

DAVID MCGOWAN

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 26 DAY
OF AUGUST, 1991.

/s/Linda Suarez

NOTARY PUBLIC

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
APR 22 92 - 11:57AM

CYNTHIA ANN KELLEY, ET AL. CIVIL ACTION

VERSUS NO. 88-2862

PRICE-MACEMON, INC., ET AL. SECTION "K" (1)

ORDER AND REASONS

Defendant, Industrial Refrigerated Systems, Inc. ("Industrial"), filed a motion for summary judgment on April 10, 1992, and noticed this motion for hearing on April 29, 1992. According to the certificate of service, Industrial's counsel timely delivered a copy of this motion to plaintiff's counsel.

Local Rule 2.07 of the Eastern District of Louisiana requires that memoranda in opposition to a motion be filed *AND* a copy be delivered to chambers eight days prior to the date set for hearing of the motion. In this case, plaintiff's counsel should have filed and delivered any reply or opposition no later than April 21, 1992. No memorandum in opposition or other reply to Industrial's motion, however, has been timely submitted by plaintiff's counsel.

DATE OF ENTRY APR 22 1992

Accordingly, this motion is deemed to be unopposed, and, further, it appearing to the Court that the motion has merit,

IT IS ORDERED that the motion is **GRANTED**. Judgment shall be entered accordingly.

IT IS FURTHER ORDERED that plaintiff's counsel shall send a copy of this order and reasons to his client and certify having taken such action by filing an affidavit into the record *AND* by delivering a copy of such affidavit to the undersigned's chambers no later than May 1, 1992, at 4:30 p.m.

A motion for reconsideration of this order based on grounds found in Rule 60(b) of the Federal Rules of Civil procedure, if any, must be filed within thirty (30) days. The motion must be accompanied by an opposition memorandum to the original motion. Because such a motion would not have been necessary had a timely opposition memorandum been filed, the costs incurred in connection with the motion, including attorney's fees, will be assessed against the party moving for reconsideration. *See* Fed. R. Civ. P. 16, 83. A statement of costs conforming to Local Rule 5.04 shall be submitted by all parties desiring to be awarded costs and attorney's fees no later than eight (8) days prior to the hearing of the motion for reconsideration.

IT IS SO ORDERED.

New Orleans, Louisiana, this 22nd day of April 1992.

/s/ J. Arceneaux

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
APR 22 92

CYNTHIA ANN KELLEY, ET AL.	**CIVIL ACTION**
VERSUS	**NO. 88-2862**
PRICE-MACEMON, INC., ET AL.	**SECTION "K" (1)**

JUDGMENT

This matter having come before the court and a decision having been duly rendered and, further, finding no just reason for delay pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered in favor of the defendant, Industrial Refrigerated Systems, Inc., and against plaintiff Cynthia Ann Kelly, individually and on behalf of her minor children, Jerred Seth Kelley and Cindy Lynn Kelley, dismissing said plaintiff's claims with prejudice, each party to bear their own costs.

New Orleans, Louisiana, this 22d day of April 1992.

/s/ J. Arceneaux
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY APR 23 1992

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
APR 28 92

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * *

MOTION FOR RECONSIDERATION

AND NOW INTO COURT, through undersigned counsel, comes plaintiff, Cynthia Ann Kelley, individually, and on behalf of her minor children, Jerred Seth Kelley and Cindy Lynn Kelley, and moves for reconsideration of this Court's order of April 22, 1992, on the grounds set forth in Rule 60(b) of the Federal Rules of Civil Procedure, for those reasons set forth in the annexed memorandum and as set out in the affidavit of counsel filed herein.

Respectfully submitted,

/s/ Henry L. Klein

HENRY L. KLEIN, ESQ.
(Bar No. 7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on this 27th day of April, 1992.

/s/ Henry L. Klein

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * * *

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION

MAY IT PLEASE THE COURT:

Rule 60(b)(1) of the Federal Rules of Civil Procedure provides that "...the court may relieve a party or his legal representative from a final judgment, order or proceeding for...mistake, inadvertence, surprise of excusable neglect."

In the case at bar, the Court has rendered Judgment, dated April 22, 1992. Plaintiff became aware of the pendency of the motions for summary judgment, as set forth in the annexed affidavit sometime on the afternoon or early evening of April 21, 1992, and immediately sought to obtain approval from opposing counsel, preliminary to making a request for an extension with the Court.

As set forth in the affidavit filed herewith, plaintiff's counsel called the Court to ascertain the next available and appropriate date so that a motion for extension could be filed, only to discover that Judgment had been rendered. It

is respectfully submitted that the failure to meet the deadline on April 21, 1992, was due to mistake, inadvertence and/or excusable neglect. Counsel meant no disrespect to the Court, nor did counsel intend to allow the matter to go "unopposed." Counsel, as the Court can see by the detail involved in the brief which needed to be filed in the matter of *Schlesinger v. Herzog, supra*, was veritably immersed in meeting a deadline which resulted in the inadvertent failure to notice that certain motions had been filed in the above captioned matter.

While there are cases from various circuits which speak to this issue, we believe that the Fifth Circuit decision in *Hibernia v Administracion Central Sociedad Anonima, et al*, 776 F.2d 1277 (1985), is dispositive. There, a motion for summary judgment was granted under similar circumstances. The District Court refused to grant a rule 60(b) motion, and the Court of Appeals reversed, noting that the rule "...is to be liberally construed so that doubtful cases may be resolved upon the merits," citing *Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 823 (5th Cir.1965).

The cases generally seem to consider the diligence in counsel's filing the 60(b) motion, the nature of the inadvertence, the merits of the motions themselves, and (in cases denying relief) the refusal by the moving party to expeditiously explain the circumstances surrounding the neglect, mistake or inadvertence.

Here, we hope the Court realizes that we would not allow, purposefully, any substantive motion to go unopposed. We have, when appropriate, communicated to the Court our agreement with motions as to which we would not file

an opposition. But at all times, we respectfully submit, we have been diligent (although perhaps not perfect) in our efforts to protect our client's interests.

The inadvertence which resulted in this Court's Judgment of April 22, 1992, was unintended, and we ask that the Court, in its wisdom and discretion, excuse the mistake.

Respectfully submitted,

/s/ Henry L. Klein

HENRY L. KLEIN, ESQ.
(Bar No. 7440)
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on this 27th day of April, 1992.

/s/ Henry L. Klein

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * * *

AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION

PARISH OF ORLEANS

STATE OF LOUISIANA

BEFORE ME, the undersigned authority, personally came and appeared:

HENRY L. KLEIN

who after first being duly sworn, did depose and say:

(1) That he is counsel of record for Cynthia Ann Kelley, individually, and on behalf of her minor children, Jerred Seth Kelley and Cindy Lynn Kelley;

(2) That affiant is a sole practitioner, and is handling the above captioned matter as "of counsel" for Heisler & Wysocki;

(3) That on April 9, 1992, affiant left New Orleans on a combination vacation/brief-writing leave in order to, in part, prepare a brief in the matter of *Schlesinger v. Herzog*, No. 90-4051, Section "D", United States District Court, which affiant had tried before the Honorable A.J. McNamara, and on which a brief of 50 pages or less was due on or before April 22, 1992;

(4) That affiant did not become aware that various motions had been filed in the above captioned matter until after he returned and saw the motions in the late afternoon or early evening of April 21, 1992;

(5) That affiant was then deeply involved in the conclusion of the brief requested by Judge MacNamara, which brief required detailed reference to the trial record, all as is shown by appendix "A" to this affidavit;

(6) That when affiant noticed that Industsrial Refrigerated Systems, Inc. had filed its motions, affiant immediately called opposing counsel to obtain his consent to an extension prior to requesting leave of Court, as affiant believes he was required to do;

(7) That affiant was unable to reach opposing counsel until Wednesday afternoon, at which time opposing counsel indicated that he had no objection to an extension of time within which to file an opposition to the motions filed;

(8) That affiant intended to file such a motion Thursday morning; on Wednesday night, however, a close

neighbor, good friend, and civic co-worker of affiant was murdered,[1] and affiant spent most, if not all of Thursday, dealing with neighborhood leaders and members of the victim's family:

(9) That on Friday morning, affiant called the Court and spoke to the Court's law clerk regarding the submission of a motion for an extension of time and regarding the next appropriate and available hearing date, and was told that the Court had entered certain orders which affiant should obtain from the clerk;

(10) That affiant immediately went to the Clerk's Office and obtained copies of the Court's Order of April 22, 1992, granting the Motion for Summary Judgment and dismissing plaintiff's claims;

(11) That affiant immediately proceeded to prepare for filing, oppositions to the motions, and a motion to reconsider pursuant to the provisions of Rule 60(b) of the Federal Rules of Civil Procedure;

(12) That affiant, at no time, intended not to oppose the motions filed;

(13) That affiant, at no time, intended to disregard

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[1] Affiant lives at 1467 Moss Street, which is almost midway between the location of an armed robbery at 900 N. Carrollton Avenue and 900 Harding Drive. Affiant had been working with Jack Bartlett and other neighborhood leaders regarding the use of Our Lady of the Holy Rosary School by the public school system. In affiant's capacity as a member of the Mayor's Task Force on Bayou St. John, and as a neighbor, affiant's total day on Thursday was devoted to this tragedy. Otherwise, affiant would have filed a motion for leave first thing Thursday morning.

the Court's local rules under specific rules applicable in Section "K", and the failure to file an opposition was through error and inadvertence and hopefully, excusable neglect.

Further affiant says not.

/s/ Henry L. Klein
HENRY L. KLEIN

SWORN TO AND SUBSCRIBED BEFORE ME, NOTARY, ON THIS THE 27th DAY OF APRIL, 1992.

/s/ James J. Morrison, Jr.
NOTARY PUBLIC

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed April 28, 92

CYNTHIA ANN KELLEY, ET AL	*	CIVIL ACTION
VERSUS	*	NO. 88-2862
PRICE-MACEMON, INC., ET AL	*	SECTION "K"

* * * * * * * * * * * * * * * * * * *

MEMORANDUM IN OPPOSITION TO MOTION OF INDUSTRIAL REFRIGERATED SYSTEMS FOR SUMMARY JUDGMENT ON SELLER LIABILITY

MAY IT PLEASE THE COURT:

Industrial Refrigerated Systems, Inc. ("IRS"), has filed a Motion for Summary Judgment on its liability herein as a "seller" of the ice storage bin manufactured by Price-Macemon/Rochester Silo. It premises its motion, *inter alia*, on an affidavit which was filed in connection with a previously denied motion for summary judgment, executed by David McGowan on August 26, 1991.

The essence of the motion and the affidavit in support thereof is that IRS was a mere "broker" and that IRS had no possession or control over the equipment or design.[1] Additionally, IRS disclaims knowledge of any

[1] Memorandum, at p. 2: Affidavit of McGowan.

defects and denies a breach of duty to warn.

We respectfully submit that the issues raised by this motion have previously been rejected by the Court, for good reason, and constitute "The Law of the Case." Alternatively, the motion should not be granted because there exist genuine issues of material facts regarding IRS's actual knowledge of the inherently dangererous nature of the bin and auger at issue.[2]

Indeed, the following quotations from previous rulings, by the Court, preclude the granting of the present motion, which insists that IRS was a "mere broker."

March 12, 1991, Memorandum and Order:

> "Jack Kelley, the husband of Cynthia Kelley and father of the minor plaintiffs, was fatally mangled in an ice auger while working for a company owned and operated by the Demere family. Turbo was the manufacturer of the ice maker which produced the ice which rotated through the auger. Plaintiff sued Turbo in that capacity, as well as other defendants, including Industrial Refrigerated Systems, Inc. ("Industrial"). *Industrial was the entity which sold the system to the Demeres.* Industrial did not manufacture the component

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[2] We incorporate herein by reference, the testimony of David McGowan, filed with the Court in connection with our post-trial motions, detailing how everyone watched as a shovel was fed into the auger as a "demonstration" prior to the plant opening.

This testimony, already of record, creates issues of fact which *cannot* be resolved by a summary judgment in favor of IRS.

parts *but did direct the building of the system on site.*"[3]

Second March 12, 1991, Memorandum and Order:

"The instant case centers around the unfortunate death of Jack Kelley when he was mutilated by an ice auger while working for a company owned by members of the Demere family. Plaintiffs, the wife and children of decedent, filed this suit against numerous defendants, including Industrial Refrigerated Systems, Inc. ("Industrial"). *Industrial sold the concept of the ice factory and the ice machine to the Demere family.* Industrial did not make the component parts, *but did put the machine together on the premises.*"[4]

October 9, 1991, Minute Entry:

"In the court's view, plaintiff has stated a cognizable claim against the defendant Industrial (as the trial has convinced the court further) *and certain fact issues needed to be decided by a jury rather than the court.*"[5]

November 13, 1991, Minute Entry:

"While the evidence may have shown Industrial,

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[3] We anticipated that IRS may call this *obiter dicta.* And that may or may not be. However, the Court consistently so held and the rulings on plaintiffs' post-trial motions, quoted below, are *not obiter dicta.*

[4] *Id.*

[5] Hereinafter, we do not believe the Court's rulings on the existence of fact issued is *obiter dicta.*

as a seller, *knew or should have known of the ice machine's defect,* the evidence does not meet the exacting standard necessary for judgment notwithstanding the verdict; it does not so conclusively prove that the defendant breached a duty to warn as to warrant a judgment notwithstanding the verdict. The court, therefore, finds that "reasonable and fair-minded" jurors *could have reached differing conclusions as to Industrial's negligence in allegedly failing to warn of the machine's alleged defect.*"

* * *

"A court may grant a new trial 'to all or any parties and on all or part of the issues...in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States....' Fed. R. Civ. P. 59(a). The Fifth Circuit has noted that this rule does not specify the grounds for a new trial, but one 'may be granted, for example, *if the district court finds the verdict is against the weight of the evidence,* the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Smith v. Transworld Drilling Co.,* 773 F.2d 610, 613 (5th Cir. 1985). Under this legal standard and the facts before it, the court finds grounds present to grant a new trial."

* * *

"The testimony of David McGowan, Industrial's president, clearly indicates *that he knew or*

should have known of the defect in the ice machine. Furthemore, the overwhelming weight of the evidence surely shows *that Mr. McGowan, as the seller's corporate representative, failed despite such knowledge to provide adequate warnings about the ice machine's defects.*[6]

* * *

"While the court makes no findings on these issues of fact and law, the weight of the evidence at trial did not adequately prove that the ice machine (and, particularly, the auger-equipped bin) posed such an obvious danger or that the decedent was so aware thereof as to relieve Industrial of its duty to warn."

* * *

"...the court is convicted that a manifest injustice has occurred *with respect to Industrial's possible liability as a seller of a dangerous product, including, specifically, the issue of this defendant's failure to warn.*"

January 27, 1992, Minure Entry:

"In the order granting a new trial, the court

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[6]See Footnote 2 by the Court:

"Defendant argues that Mr. Gowan and others knew of the auger's obvious danger and provided adequate warnings. The weight of the evidence, however, does *not* sustain defendant's contention *that others knew of the obvious danger* where employees regularly entered the ice silo as part of their duties or that Industrial provided warnings adequate to meet the requisites of Louisiana Law."

> found that substantial error may been (sic) committed and that the evidence *did not clearly support the jury's verdict on seller's liability.*"

The present motion for summary judgment is not only ill-founded, on it's face, but would have the Court reverse itself on already well-reasoned interlocutory decisions, regarding fact issues that would more reasonably warrant summary judgment in favor of plaintiff.[7]

In order to deal with the pending motion, the Court, if inclined to go beyond it's own previous rulings, need not look beyond the first paragraph:

> "Louisiana law is well settled as to the duty imposed on retail sellers. According to the Louisiana decisions, '[t]ort liability for a defective product attaches to a non-manufacturer seller who does not vouch for the product by holding it out as his own or who is not a professional vendot or merchant "*only if he knew or should have known' that the product sold was defective and failed to declare it.*" ' *Nelton v. Astro-lounger Manufacturing Co.,* 542 So.2d 128 (La.App. 1st Cir. 1989) (citing *Harris v. Atlanta Stove Works, Inc.,* 428 So.2d 1040, 1043 (La. App. 1st Cir.), *writ denied,* 434 So.2d 1106 (La. 1983))."

This is, indeed, the law. And it is the application of that law that precludes the pendent motion from being

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[7] In our motion for directed verdict, and in our post-trial motion for Judgment n.o.v., we believe and argued that all of the elements of seller liability were established so as to warrant judgment in favor of plaintiff on that issue. We respectfully submit that this is still the case, although we do not, for now, so move.

granted. As the Court has already ruled, Industrial *did* have knowledge of the alleged defects in the orbital bin at the time of the sale, Industrial *did* have a duty to warn the buyer.

These are, at best, fact issues, and the motion should therefore be DENIED.

Respectfully submitted,

/s/ Henry L. Klein

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New Orleans, LA 70113-1103
(504) 586-9971

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on the 27th day of April, 1992.

/s/ Henry L.Klein

APPENDIX J

These two warning decals *were* sent by the manufacturer to the seller, Industrial Refrigerated Systems, Inc. and *were* available when the Auger-eating demonstration took place. Page A-49, *supra.*

The Court of Appeals recognized a separate basis for seller liability where sellers fail to use warnings supplied to them, but nevertheless granted summary judgment, *sua sponte,* on matters *not* raised by the underlying motion. These decals were introduced at trial and were part of the total record.

WARNING

WARNING

MAINTENANCE OF SYSTEM FROM INSIDE STRUCTURE

1. A MINIMUM OF ONE OBSERVER BE PRESENT AT ALL TIMES OUTSIDE OF STRUCTURE TO MONITOR ACTIVITIES INSIDE AND OUTSIDE OF STRUCTURE DURING ANY INTERNAL MAINTENANCE.
2. DISCONNECT AND LOCK OUT ALL POWER SOURCES IN OFF POSITION. (It is recommended that you padlock control panel shut - and person entering silo have possession of key)
3. REVIEW OPERATORS' MANUAL SAFETY SECTION BEFORE ENTERING.
4. DO NOT ALLOW CHILDREN OR MINORS TO ENTER STRUCTURE. INEXPERIENCE MAY RESULT IN DEATH.
5. MAINTENANCE WITHIN THE STRUCTURE IS EXTREMELY DANGEROUS — PLEASE — FOR YOUR OWN LIFE — OBEY THE ABOVE AND ALL OTHER SAFETY PRECAUTIONS.

THIS SIGN TO BE PLACED ON OR NEXT TO STRUCTURE ACCESS DOOR

⚠ DANGER

ROTATING AUGER CAN KILL OR DISMEMBER

KEEP ALL GUARDS, COVERS AND SHIELDS IN PLACE.

INSTALL SAFETY PLATE BEFORE OPERATING.

STAY WELL CLEAR OF AUGER AND KEEP OTHERS AWAY WHEN OPERATING.

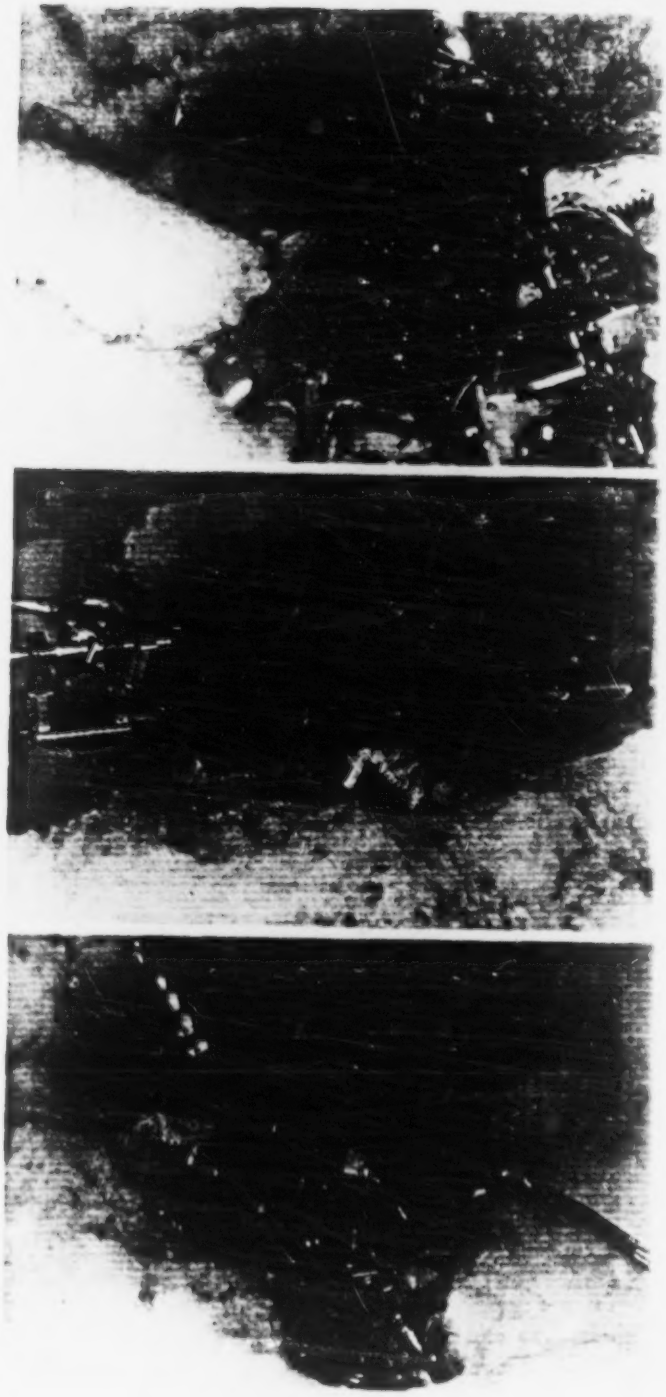
DISCONNECT & LOCKOUT POWER SOURCE BEFORE SERVICING.

FAILURE TO HEED MAY RESULT IN PERSONAL INJURY OR DEATH

APPENDIX K

W A R N I N G

These photographs of Jack Kelley's torso are gruesome and may be shocking to a viewer.



PLAINTIFF'S
EXHIBIT